of the number allowed in the charter, and if this is to be the effect it is just to give him a hearing, as it was to give the plaintiff a hearing before his expulsion. The argument on both sides has been able and exhaustive of the learning on the points discussed, to only one of which, preliminary to any examination of the merits, have we found it necessary to give attention.

There is no error, and the plaintiff is not entitled to his writ. It is so adjudged.

No error. Affirmed.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF GEORGIA.[2]

SUPREME COURT OF MISSOURI.[3]

COURT OF ERRORS AND APPEALS OF NEW JERSEY.[4]

SUPREME COURT OF NEW JERSEY.[5]

SUPREME COURT OF WISCONSIN.[6]

ASSIGNMENT. See *Attorney.*

ATTORNEY.

Agreement for Lien on Judgment as Compensation for Services—Set off—Assignment.—An agreement between an attorney and his client that the attorney shall have a lien upon a certain judgment to be recovered, for a specified sum, as compensation for his services, constitutes a valid equitable assignment of the judgment *pro tanto* which attaches to the judgment as soon as entered: *Terney* v. *Wilson*, 16 Vroom.

The equity of the assignee under such an assignment is superior to the claim of the judgment-debtor to set off against the judgment, a judgment against the plaintiff which he, the debtor, had purchased after the entry of the judgment against himself and before he had notice of the assignment: *Id.*

A failure to give to the debtor notice of the assignment of the debt will not subject the assignee to merely equitable claims of the debtor, which do not attach to the debt itself and which accrue to him after the assignment: *Id.*

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[1] Prepared expressly for the American Law Register, from the original opinions. The cases will probably appear in 109 U. S.

[2] From J. H. Lumpkin, Esq., Reporter. The cases will probably appear in 68 or 69 Ga. Reports.

[3] From T. K. Skinker, Esq., Reporter; to appear in 77 Mo. Reports.

[4] From G. D. W. Vroom, Esq., Reporter; to appear in 16 Vroom Reports.

[5] From G. D. W. Vroom, Esq., Reporter; to appear in 16 Vroom Reports.

[6] From Hon. A. M. Conover, Reporter; to appear in 58 Wisconsin Reports.

BANK.

Authority of Cashier.—A banking corporation, whose charter does not otherwise provide, may be represented by its cashier in transactions outside of his ordinary duties without his authority to do so being in writing, or appearing in the records of the proceedings of the directors: his authority may be by parol and collected from circumstances, or implied from the conduct and acquiescence of the directors: *Martin et al.* v. *Webb et al*, S. C. U. S., Oct. Term 1883.

BILLS AND NOTES.

Accommodation Maker—Discharge of by Indulgence to Indorser.—After the indorsement of a promissory note, the maker stands in the position of an acceptor of a bill of exchange and the indorser in that of the drawer. As to the holder, the maker or acceptor is primarily liable, and the indorser or drawer is secondarily liable. In a suit by the holder the maker or acceptor may plead and prove that he stood in the position of a mere accommodation acceptor, and, therefore, a surety; that the holder knew this fact and that the maker was not interested in the note before taking it; that the holder had extended the time of payment for a valuable consideration promised by the indorser, without the consent of the maker, and that the indorser had become insolvent: *Hall* v. *Capital Bank of Macon*, 68 or 69 Ga.

Indulgence by the holder to the acceptor without the consent of the drawers, who were mere sureties, granted for a consideration, has been held to discharge such sureties; and the same principle will apply to this case: *Id.*

Inland Bill—Consideration—Pleading.—An instrument in this form: "Building committee will pay G. W. T. the sum of $126.25, and charge to (signed) N. and L.," is an inland bill of exchange, and as such, under the law merchant, imports a consideration without the words "value received." In declaring upon such an instrument no consideration need be alleged: *Taylor* v. *Newman*, 77 Mo.

Parol Evidence to show that Maker was Agent of Third Person.—In an action for money paid to the use of defendant, it appeared that plaintiff had been obliged to pay a note made by one B., and indorsed by plaintiff at B.'s request. Defendant's name did not appear upon the note; but parol evidence was admitted to show that in obtaining plaintiff's indorsement B. was acting as defendant's agent. *Held*, that there was no error in admitting this evidence: *Sauer* v. *Brinker*, 77 Mo.

Transfer after Maturity—Set off.—A negotiable promissory note transferred after maturity, passes into the hands of the indorsee subject only to such equities and defences as are connected with the note itself, not such as grow out of distinct and independent contracts. The statute of set off (R. S. 1879, § 3868), is not applicable to negotiable paper. Overruling *Munday* v. *Clements*, 58 Mo. 577: *Cutler* v. *Cook*, 77 Mo.

COMMON CARRIER. See *Ferry*.

CONTRACT.

Alternative—Right of Election in Promisor.—When an obligation is

in the alternative, as to do a thing upon one day or another, or in one way or another, the right of election is with the promisor if there is nothing in the contract to control that presumption: *Dessert* v. *Scott et al.*, 58 Wis.

A contract for the sale of lands, made September 25th 1878, provided that the amount due to the state on the land should be deducted from the purchase-money, and "if any interest due the state for the year 1878, or anything later, parties of the first part to pay the same to January 1st 1879, or up to the time of closing this sale." Both parties expected the sale would be closed prior to January 1st 1879, but, through no fault of the vendors it was not so closed until April 7th 1879. *Held*, that the vendors were not bound to pay the interest due to the state for the year 1879, which was by law "payable in advance on the 1st day of January, or on or before the 31st day of May thereafter": *Id.*

Corporation. See *Railroad.*

Liability of Stockholders.—A state statute authorizing the formation of corporations for manufacturing, &c., provided that "All the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company in which they are stockholders to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of the capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made," &c. *Held*, that the individual liability of the stockholders thus arising was not in the nature of a penalty, but was based on a contract between the stockholders and the creditors of the company; and hence that this liability could be enforced outside of the limits of the state by which the law was passed: *Flash* v. *Conn*, S. C. U. S., Oct. Term 1883.

In such a case as the above the decision of the state court is entitled to great, if not conclusive weight with the federal courts: *Id.*

Courts.

Certificates of Inferior Courts—Mandamus.—Certificates of inferior courts as to what has transpired in their presence, cannot be contradicted by affidavits: *State* v. *Camp*, 16 Vroom.

Mandamus will not be awarded to compel a court to do what, in its discretion, it might lawfully refuse to do: *Id.*

Criminal Law.

Evidence — Dying Declarations—Admissibility.—Great caution is necessary not only in the admission, but in the use of dying declarations. The acts often occur under circumstances of confusion and surprise, calculated to prevent accurate observation; the consequences of the violence may occasion an injury to the mind, and an indistinctness of memory as to the transaction; the deceased may have stated his conclusions, which may be wrong; he may have omitted important particulars; he may give a partial account; or his passions may not have subsided; he is not subject to cross-examination; and such declarations as he makes are apt to have great weight with juries. Upon the offer of such declarations the judge must decide upon the preliminary

evidence in the first instance. If he deems it *prima facie* sufficient, he should admit the declarations, instructing the jury afterwards to pass finally for themselves on the question, whether or not the declarations were conscious utterances in the apprehension and immediate prospect of death. The admissibility and competency of the evidence is for the judge to decide: *Mitchell* v. *The State*, 68 or 69 Ga.

Defence of Insanity—Burden of Proof.—It is not error to refuse to charge that if there be a reasonable doubt in the mind of the jury as to the sanity of the accused, they should resolve the doubt in favor of his insanity. The plea of insanity is a defence, and the burden of proving it is on the accused: *Graves* v. *State*, 16 Vroom.

The defence of insanity, while not disfavored by the law, is regarded with jealousy, and in the interest of public justice it is subjected to a close and careful scrutiny. It must be proved to the satisfaction of the jury, and it may be established by the preponderance of proof. In other words, it must be sustained by the evidence: *Id.*

Practice—Newly-Discovered Evidence.—A judgment of conviction will be reversed where the trial court refuses to grant a new trial asked on the ground of newly-discovered evidence which is relevant and important, and which could not have been discovered until after the trial: *The State* v. *Curtis*, 77 Mo.

Debtor and Creditor.

Fraudulent Conveyance — Attachment — Exemption — Burden of Proof.—If a debtor sells his goods in order to defraud his creditors, and the vendee purchases in order to aid in the perpetration of the fraud, the sale is void as against creditors, no matter what price was paid, or how early after the sale possession was taken, or how notorious the change of possession: *Stone* v. *Spencer*, 77 Mo.

Where the right of an attaching creditor is contested by a transferee of the debtor, on the ground that the goods in controversy were exempt from attachment in the hands of the debtor: *Held*, that the burden of proving such exemption was on the transferee: *Id.*

Decedents' Estates.

Legacy—Conversion—Election to take Property—Power of Court to elect for Infant.—Where a testator directs that his executors shall sell certain property and divide the proceeds among certain named legatees, it is optional with such legatees to elect to take either the property itself or the money arising from the sale thereof. The legacy is as much of the property as of the proceeds of the sale; and to allow the legatees to take the property instead of the money arising from the sale is no violation of the testamentary scheme: *Swann* v. *Garrett*, 68 or 69 Ga.

A court of equity has jurisdiction and power to elect for an infant legatee, where upon due inquiry it shall appear to be for the interest and advantage of the infant, that he shall take the property itself or its proceeds. The interests of all the legatees are to be consulted as well as that of the infant: *Id.*

Deed. See *Notice.*

Easement. See *Party-Wall.*

Errors and Appeals.

Order to answer and pay Costs.—An order requiring a party who has refused to answer certain interrogatories in an examination before a court commissioner, to appear before the commissioner and answer such interrogatories and also to pay the costs of the proceedings already had and $10 costs of the motion, is appealable. *State ex rel.* v. *Lonsdale*, 49 Wis. 348; *Stuart* v. *Allen*, 45 Id. 158, distinguished: *Cleveland* v. *Burnham*, 58 Wis.

Execution.

Joint Defendants—Release of Property of One—Surety—Discharge of by Release of Principal.—A judgment creditor having a judgment against several defendants may direct the officer holding the execution to make the amount thereof out of the property of such of the defendants as he may see fit to proceed against: *Hyde* v. *Rogers, Sheriff*, 58 Wis.

The mere seizure of the property of one of such defendants does not pay or satisfy the judgment, and if the property seised is released and returned to the possession of the owner at his request, he cannot set up such seizure as a payment or satisfaction of the judgment: *Id.*

But where one of the defendants stands as surety for the others or some of them, the judgment creditor, if he knows that fact, cannot voluntarily release the property of the principal debtors which has been seized upon the execution and then resort to the property of the surety. Such a release works an extension of the time of payment to the principal debtors, and the surety is thereby discharged: *Id.*

Ferry.

Liability of Ferryman for Goods of Passenger.—The liability of a ferryman with respect to property retained by a passenger within his own control and management is not the same as that incurred with respect to goods delivered to him and placed within his control for transportation. With respect to the latter, the ferryman undertakes for their safe carriage as against all perils but such as arise from the act of God or the public enemy; with respect to the former, his duty is to provide his boat with such means and appliances as are adapted to the security and safety of the passenger and his property, and to use such means and appliances with skill and care. For a failure in the performance of this duty, the ferryman will be liable if injury result: *Dudley* v. *The Camden and Philadelphia Ferry Co.*, 16 Vroom.

But if, in such a case, the passenger, by negligence in the care of property of which he retains control, contributes to its loss or injury, he cannot recover of the ferryman, though negligent: *Id.*

Gift. See *Equity*.

Highway.

Side Track—Acquiescence of Town in use of—Notice.—A town may, by long acquiescence in the use of a side track as a part of the travelled highway, become bound to keep the same in repair, although it has provided another sufficient track for public travel: *Cartright* v. *Town of Belmont*, 58 Wis.

To relieve itself from liability for the want of repair of a side track which is equally as accessible and apparently as much travelled as the prepared track, the town should give some reasonable notice to the public travelling there that the use of such side-track is unauthorized: *Id.*

Such notice may be given by placing obstructions in the side-track, or by putting up notices or in any other manner which will sufficiently notify travellers that the town desires them to use the graded track alone: *Id.*

Husband and Wife.

Separate Acknowledgment by Wife.—In a suit to set aside a deed of trust executed to secure the payment of a note signed by husband and wife, and the acknowledgment of which was certified as required by law, it was in proof that the wife signed the note and the deed, having an opportunity to read both before signing them; she was before an officer competent to take her acknowledgment, and he came into her presence, at the request of the husband, to take it; and she knew, or could have ascertained, while in the presence of the officer, as well to what property the deed referred as the object of its execution: *Held*, that the certificate must stand against a mere conflict of evidence as to whether she willingly signed, sealed and delivered the deed, or had its contents explained to her by the officer, or was examined privily and apart from her husband; and that even if it be only *prima facie* evidence of the facts therein stated, it cannot be impeached, in respect to those facts, except upon proof which clearly and fully shows it to be false or fraudulent: *Young* v. *Duvall et al.*, S. C. U. S., Oct. Term 1883.

Infant. See *Decedents' Estates.*

Insurance.

Agreement of Agent to renew Policy—Waiver of Proofs of Loss.—If, previous to the expiration of a policy of insurance, the agent of the company agrees orally to renew the policy, and that he will attend to it right away, and the minds of the parties meet as to the terms of such agreement, and nothing remains to be done except that the agent of the company shall make out and deliver the renewal receipt and that the insured shall then or at some subsequent time pay the premium, the agreement is binding upon the company, and it can avoid liability thereon only by tendering the renewal receipt and demanding the premium and the failure of the insured to pay the same, or by giving notice to the insured, before a loss, that it refuses to carry the risk. *Taylor* v. *Phœnix Ins. Co.*, 47 Wis. 365, distinguished: *King* v. *Hekla Fire Ins. Co.*, 58 Wis.

A denial by an insurance company, after a loss has occurred, of all liability or that it had any risk on the property burned, constitutes a waiver of the proofs of loss required by the policy: *Id.*

Accident Policy—Voluntary Exposure.—In an action upon a policy of insurance against accidents a complaint alleging that the plaintiff while travelling by railway fell asleep from weariness and the motion of the cars, and when it was quite dark, "and while he was in a dozed and unconscious condition of mind, and not knowing or realizing what he

was doing, involuntarily arose from his seat and walked unconsciously to the platform of the car, and, without fault on his part, fell therefrom to the ground," and was injured, *held* sufficiently to show that the injuries were not "self-inflicted" and were not the result of "design" or "voluntary exposure to unnecessary danger" within the meaning of conditions exempting the insurer from liability: *Scheiderer* v. *Travellers' Ins. Co.*, 58 Wis.

Construction of Agency Clause—Contract not varied by Evidence of Custom.—A fire insurance policy contained this clause: "This insurance may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time at the option of the company on giving notice to that effect and refunding a rateable proportion of the premium for the unexpired term of the policy. It is a part of this contract that any person other than the assured, who may have procured the insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company under any circumstances whatever, or in any transactions relating to this insurance:" *Held*, that this clause imports nothing more than that the person obtaining the insurance was to be deemed the agent of the insured in matters immediately connected with the procurement of the policy; that where his employment did not extend beyond the procurement of the insurance, his agency ceased upon the execution of the policy, and subsequent notice to him of its termination by the company was not notice to the insured: *Grace et al.* v. *Ins. Co.*, S. C. U. S., Oct. Term 1883.

Parol evidence of usage or custom among insurance men to give such notice to the person procuring the insurance was inadmissible to vary the terms of the contract: *Id.*

JUDGMENT. See *Attorney.*

Nunc pro tunc Judgment—Effect of.—In order that a *nunc pro tunc* entry of judgment may bind a person who is not a party thereto (such as a surety in a supersedeas bond given on appeal from the judgment as first entered), it must appear that he had notice of the judgment really rendered at the time his rights were acquired or his liability fixed thereunder, or that he had notice of the application to have the *nunc pro tunc* entry and made an opportunity to appeal therefrom: *Koch* v. *The Atlantic and Pacific Railroad Co.*, 77 Mo.

LEGACY. See *Decedents' Estates.*

MALICIOUS PROSECUTION.

Reasonable Cause—Express Malice.—An action for a malicious prosecution cannot be maintained, even though express malice be shown, if the defendant had good reason to believe and did believe, when he made complaint, that the plaintiff had committed the offence charged: *Murphy* v. *Martin*, 58 Wis.

MASTER AND SERVANT.

Railroad—Waiver by Employee of Right to Sue for Injuries.—An employee of a railroad company may by contract waive his right to sue

for injuries not arising from criminal negligence on the part of the company, or its other employees, but any negligence, either of omission or commission, on the part of other employees of the road, in connection with their business, from which serious injury results, constitutes criminal negligence, and a contract waiving the right to sue for injuries resulting therefrom is contrary to public policy and void: *Cook* v. *Western & Atlanta Railroad*, 68 or 69 Ga.

Railroad—Negligence—Co-employee—In an action against a railroad company to recover for the death of a locomotive engineer, killed while on duty, through the negligence of the train dispatcher, the plaintiff failed to show that the train dispatcher and the engineer were not fellow-servants. *Held*, that for this omission the plaintiff was properly nonsuited: *Blessing* v. *The St. Louis, Kansas City & Northern Railway Co.*, 77 Mo.

MUNICIPAL CORPORATION. See *Highway.*

NEGLIGENCE. See *Ferry; Master and Servant.*

Damage—Remote Results—Failure of Theatre Company to Perform by Reason of Delay of Train.—Damages recoverable for a breach of contract are such as arise naturally and according to the usual course of things from such breach and such as the parties contemplated when the contract was made as the probable result of its breach: *Georgia Railroad* v. *Hayden*, 68 or 69 Ga.

A theatrical manager purchased tickets for himself and troupe over a railroad, at the terminus of which they were to take a connecting train and proceed to a point at which a performance was to be given. Tickets had been sold to this performance to the amount of $288. There had been a collision of other trains on the first railroad, and the train taken by plaintiff was delayed so as to miss connection with the other train; plaintiff failed to reach his destination, and the money was refunded to the purchasers of seats. At the point of delay, late at night, plaintiff first notified the railroad company of his arrangements, but it did not appear that the telegram was received in time to remedy the difficulty. *Held*, that the damages resulting from the particular character of the business of the traveller, unknown to the railroad company contracting with him, were too remote to be recovered: *Id.*

Evidence—Contributory Negligence—Question for Jury.—The mere fact that a person attempting to cross a bridge on a dark night knows that it is not provided with a railing, will not prevent him from recovering damages for injuries sustained in falling from the bridge if he falls without fault or negligence on his own part: *Loewer* v. *The City of Sedalia*, 77 Mo.

Whether the want of a warning light at a bridge at night, tends to establish negligence, depends upon the character of the danger, as arising from the situation, condition and use of the bridge, and is properly a question of fact for the jury: *Id.*

Where the question was whether plaintiff was guilty of contributory negligence in using a dangerous sidewalk when he might have walked in the roadway, *Held*, that this was for the jury, and not the court, to determine: *Id.*

NOTICE.

Record of Defective or Irregular Deed.—In order to be constructive notice to subsequent purchasers the record of a deed or other instrument affecting the title to land must show upon its face that such instrument was so executed and acknowledged as to entitle it to be recorded: *Girardin* v. *Lampe*, 58 Wis.

PARTY-WALL.

Nature of Ownership—Rights of Owners.—The owners of a party-wall standing in part upon the lot of each are not tenants in common, but each owns in severalty so much of the wall as stands upon his lot, subject to the easement of the other owner for its support and the equal use thereof as an exterior wall of his building. And the owner on one side may, within the limits of his own lot, increase the thickness, length, or height of the wall, if he can do so without injury to the building on the adjoining lot: *Andrae* v. *Haseltine*, 58 Wis.

PRESUMPTION.

Death—Absence for Seven Years—Burden of Proof.—A person who absents himself from this state for seven successive years is presumed to be dead, and the party asserting that he is living must prove it: *Hoyt* v. *Newbold*, 16 Vroom.

After the presumption of death arises, the burden of proof is on the party denying the death to show that the person is alive and to overcome the presumption by proof: *Id.*

There should be something more than similarity of name to overcome the presumption of death raised by the statute. The identity of the person should be proved: *Id.*

RAILROAD. See *Master and Servant*

Subscription to Stock—Guarantee of Route.—Proof that certain of the promotors of a railroad scheme guaranteed that the route would pass near to a certain tract of land, accompanied with proof of a deviation from such line, will not be sufficient to discharge a subscriber who had subscribed in reliance on such statement, there being no evidence tending to show any fraudulent intent: *Braddock* v. *The Philadelphia, Marlton and Medford Railroad Co.*, 16 Vroom.

SHERIFF.

Amercement—Evidence.—On a motion to amerce a sheriff for neglecting to levy a writ of *fi. fa.*, the plaintiff is not required to show with precision the value of the property on which levy might have been made. It is enough if he show that the neglect has deprived him of a substantial benefit under his writ: *White* v. *Rockafellar*, 16 Vroom.

False Return—Liability for—Damages.—Under the statute (R. S. 1879, § 2401,) an officer to whom an execution is delivered, in case he makes a false return on the writ, is liable for the whole amount of money directed to be levied. *Held*, that where the falsity consisted in stating that the writ was ordered to be returned satisfied by plaintiff's attorneys, an amendment by leave of court striking out the false state-

ment was no defence to an action for the false return: *State* v. *Case*, 77 Mo.

Corby v. *Burns*, 36 Mo. 194, distinguished, on the ground that in that case the amendment was in conformity with the facts: *Id.*

A plea of insolvency of defendant in the execution, is no defence to an action against a sheriff and his sureties upon his official bond for making a false return: *Id.*

Where no damages are proven, a sheriff is not liable, even for nominal damages, for failure to return an execution at the time fixed by law: *Id.*

SPECIFIC PERFORMANCE. See *Equity.*

SURETY. See *Execution.*

Cashier—Defaulter at Time of giving Bond.—A surety upon the bond of a cashier of a bank is not discharged by the mere fact that the cashier was, at the time the bond was given, a defaulter. Nor will the neglect of the bank to ascertain that fact discharge him: *Bowne* v. *Mount Holly National Bank*, 16 Vroom

Rule of Construction as to Matters Collateral to Contract.—The rule that the contract of a surety is to be construed strictly, applies only to the contract itself, and not to matters collateral and incidental, or which arise in execution of it, which are to be governed by the same rules that apply in like circumstances, whatever the relation of the parties: *Warren* v *Connecticut Mut. Life Ins. Co.*, S. C. U. S., Oct. Term, 1883.

UNITED STATES COURTS. See *Corporation.*

Jurisdiction Dependent on Citizenship.—When jurisdiction of the Circuit Court depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, must be distinctly and positively averred in the pleadings, or appear affirmatively and with equal distinctness in other parts of the record. An averment that parties reside, or that a firm does business in a particular state, or that a firm is "of" that state, is not sufficient to show citizenship in such state: *Grace et al.* v. *Insurance Co.*, S. C. U. S., Oct. Term 1883.

Where the record does not show a case within the jurisdiction of a Circuit Court, this court will take notice of that fact, although no question as to jurisdiction has been raised by the parties: *Id.*

WILL.

Execution of a Power.—Where the donee of a power executes an instrument, which is making a disposition of the property, within the scope of the power, but the power is not referred to therein, and it is necessary, in order for the instrument to have its due legal effect, to construe it as an exercise of the power, it will be so regarded: *Warner* v. *Connecticut Mut. Life Ins. Co.*, S. C. U. S., Oct. Term 1883.

The power to incumber an estate "by way of mortgage or trust deed, or otherwise, and renew the same for the purpose of raising money to pay off any and all incumbrances now on said property," is broad enough to include the renewal and extension of an existing incumbrance as well as the creation of a new one: *Id.*